ARKANSAS SUPREME COURT

No. CR 06-1065

	Opinion Delivered **May 10, 2007**
CARDRICK FLOWERS Appellant	APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, CR 2003-239, HON. ROBERT HOLDEN WYATT, JR., JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED.

PER CURIAM

A jury found appellant Cardrick Flowers guilty of aggravated robbery, theft of property, and being a felon in possession of a firearm, and sentenced him to serve an aggregate term of 480 months' imprisonment. The Arkansas Court of Appeals affirmed the judgment. *Flowers v. State*, 92 Ark. App. 29, 210 S.W.3d 907 (2005). Appellant timely filed a pro se petition for postconviction relief under Ark. R. Crim. P. 37.1, in which he alleged ineffective assistance of counsel on a number of grounds. The trial court appointed counsel and conducted a hearing on the petition, but denied relief on the petition, finding trial counsel was not ineffective. Appellant now brings this appeal of the order denying relief upon his petition.

Appellant raises four points for reversal on appeal, alleging error by the trial court in determining trial counsel was not ineffective, as follows: (1) that counsel was ineffective for failure to seek a severance or limiting instruction as to the felon-in-possession charge; (2) in alternative to the first point, that counsel was ineffective for failure to offer to admit or stipulate to the prior felony on which

the felon-in-possession charge was based; (3) that counsel was ineffective for failure to seek admission of a letter from a co-defendant which appellant asserted exonerated appellant and impeached the co-defendant's testimony; (4) counsel was ineffective for making comments appellant alleges were racially prejudicial during closing arguments. The issue raised in appellant's second point on appeal, however, was not addressed by the trial court in its order, and we therefore do not address it. Failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal. *Howard v. State*, 367 Ark. 18, ___ S.W.3d ___ (2006).

As to the remaining points, the trial court found that trial counsel had chosen to try all the charges together as a matter of trial strategy, that appellant had not shown introduction of the letter from the co-defendant would have altered the outcome of the trial, and that the comments made during closing arguments were trial strategy and the jury had been instructed not to consider those statements as evidence. In an appeal from a trial court's denial of a petition under Rule 37.1, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). Here, we cannot say that the trial court's findings were clearly erroneous.

The *Strickland* standard is a two-part test. When a convicted defendant complains of ineffective assistance of counsel, he must show first that counsel's performance was deficient through a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Additionally, the petitioner must show that the deficient

performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000). The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Burton v. State*, 367 Ark. 109, ___ S.W.3d ___ (2006). The petitioner must show that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id.*

Appellant asserts in his first point that trial counsel was ineffective for failing to seek a severance or limiting instruction as to the felon-in-possession charge. The trial court held a hearing on the petition and took evidence concerning trial counsel's decision not to file a motion to sever the charge. Counsel testified that he had no independent recollection of any discussions on that subject as to appellant's particular case. Counsel went on to testify that he generally would have filed for severance in such a situation, but that because the defense was a complete denial, he would not have wanted to risk conviction on the second charge after an acquittal. Counsel also indicated that his general policy had changed somewhat since that time, so that he now would file a motion in every case, and later dismiss the motion after consulting with his client concerning the defense. We cannot say from this evidence that the trial court was clearly erroneous in finding the decision to be a tactical one.

Counsel is allowed great leeway in making strategic and tactical decisions, those decisions are a matter of professional judgment, and matters of trial tactics and strategy are not grounds for

postconviction relief on the basis of ineffective assistance of counsel. *Rankin v. State*, 365 Ark. 255, ___ S.W.3d ___ (2006). Counsel's strategic decisions must still, however, be supported by reasonable professional judgment. *Weatherford v. State*, 363 Ark. 579, ___ S.W.3d ___ (2005) (per curiam). Appellant argues that there is no trial strategy for which a motion to sever a felon-in-possession charge would not prove beneficial. That is not the case, and this court acknowledged that an attorney may make a decision not to sever a felon-in-possession charge for tactical reasons in *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002).

In *Burton*, this court noted that we have frequently remarked on the substantial prejudice resulting from the joinder of a felon-in-possession charge to other charges, and, without evidence in the record of why trial counsel failed to file a motion for severance, we refused to presume that trial counsel's failure to request severance of the felon-in-possession charge fell within the category of a tactical decision. *Id.* at 111-112, ___ S.W.3d at ___. But, unlike the case in *Burton*, here, there was evidence, if not as to the specific decision made in this case, as to the attorney's general practice at that time in handling cases such as this. Based on his recollection of those practices, counsel testified that he did not file a motion to sever because of the appellant's defense.

On review, this court defers to the findings of the circuit court because the resolution of credibility issues is within the province of the trial court. *State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002). The trial court obviously found trial counsel's testimony credible, and appellant did not provide any evidence at the hearing that counsel's usual practice had not been followed in this case. While we will not presume that counsel made a tactical decision not to move for severance, once evidence of such a decision has been presented, we will defer to the findings of the trial court. The findings on the issue in this case are not clearly erroneous.

Because the trial court was correct in finding no error on the part of counsel, we need not

consider whether appellant was prejudiced by counsel's decision not to file a motion to sever. Nor do we consider whether counsel should have requested a limiting instruction as to the felon-in-possession charge. While appellant's brief includes a conclusory allegation that counsel's failure to request such an instruction was ineffective assistance, he does not cite authority in support of that argument or develop the argument. This court does not research or develop arguments for appellants. *Hester v. State*, 362 Ark. 373, 208 S.W.3d 747 (2005).

Appellant's next point for reversal concerns counsel's failure to seek the introduction of a letter from appellant's co-defendant to appellant during cross-examination of the co-defendant at trial. Appellant's defense was that he was unconscious and asleep in the back seat of the car while his two co-defendants committed the robbery of the restaurant. In a prior line-up, some of the restaurant employees had identified one of appellant's co-defendant's as one of the robbers. At trial, the other co-defendant, Vic Norman, testified that he and appellant had committed the robbery, while the co-defendant identified by the employees drove the car.

Trial counsel had a letter from Mr. Norman to appellant in which he stated "I'm sorry I lied on you," and Mr. Norman indicated that his statements to the police and at trial were not true. Counsel had Mr. Norman read the letter silently during cross-examination and admit that the statements in the letter were not consistent with his testimony. Counsel did not, however, request introduction of the letter into evidence. Appellant argues that the trial court erred in concluding that appellant had not met his burden to show that he was prejudiced by this failure to seek introduction of the letter.

As the State points out, the letter, read in its entirety, contains some statements that might not serve to support the credibility of the letter as a whole and might raise questions as to the motivation for the letter. Counsel did utilize the letter to attack Mr. Norman's testimony, but did not go so far as to seek to have it admitted.

The manner of questioning a witness is by and large a very subjective issue about which different attorneys could have many different approaches. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). The jury determines not merely the credibility of the witnesses, but the weight and value of their testimony. *Id.* As in *Nelson*, we cannot say that the evidence appellant contends should have been presented to the jury was sufficient so that its absence tainted appellant's entire trial to the degree that the proceeding was unfair. We cannot say that the trial court was clearly erroneous to find that appellant did not carry his burden to show that the decision reached would have been different had the letter been introduced into evidence.

Appellant's final argument is that counsel was ineffective for making statements during closing argument that appellant contends were prejudicial. Specifically, during his argument counsel stated, "And, yes, I know he is a young black man. And I do know there are shooting [*sic*] among that group of people at times. I know at times there are gang wars. I know there are times there's incidents with police." Appellant contends that these statements, if made by the prosecution, would be reversible error and urges that we should therefore find counsel was ineffective for including them in his closing argument.

Yet the statements were not made by the prosecution, and we would agree with the State's argument that, when taken in context with the rest of the closing statement, those statements actually support counsel's defense by urging the jurors to set aside such preconceived notions. In *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989) (per curiam), this court considered a claim of ineffective assistance where trial counsel had, in closing argument, referred to the defendant as a monster and compared him to Jack the Ripper, the Mad Hatter and Lizzie Borden. O'Rourke's counsel's strategy was to convince the jury that the defendant was insane and it would be merciless to put him to death. We held that while other counsel might debate the tactics, lack of success with those tactics did not

equate with ineffective assistance of counsel. *Id*. at 154, 765 S.W.2d 922. The statements here were likewise a part of counsel's trial strategy and appellant did not show that strategy could not have been the result of reasonable professional judgment.

The trial court was not clearly erroneous in its findings. Because the trial court did not err in ruling that trial counsel was not ineffective, we affirm the order denying postconviction relief.

Affirmed.